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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
BUREAU OF RECLAMATION
REQUEST FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
FIX

**OPPOSITION TO DWR'S OBJECTIONS
TO, AND MOTION TO STRIKE THE PART
2 TESTIMONY OF MARC DEL PIERO,
CSPA-208-CORRECTED AND RELATED
ORAL TESTIMONY**

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1 **I. INTRODUCTION.**

2 Protestants County of San Joaquin, San Joaquin County Flood Control and Water
3 Conservation District, and Mokelumne River Water and Power Authority (“San Joaquin County
4 Protestants”), Local Agencies of the North Delta (“LAND”), California Sportfishing Protection
5 Alliance, California Water Impact Network, and AquAlliance (collectively herein, “San Joaquin
6 County et al.”) respectfully submit this brief in opposition to the Department of Water
7 Resources’ (“DWR’s”) April 26, 2018 “Objections to, and Motion to Strike, the Part 2 Testimony
8 of Marc Del Piero, CSPA-208-Corrected and Related Oral Testimony” (“DWR Objections”).

9
10 DWR’s objections to Mr. Del Piero’s testimony constitute a broad-based attack on
11 material directly relevant to the Public Trust and Public Interest issues at the heart of Part 2.
12 To strike all the portions of his testimony to which DWR objects would be to undermine
13 fundamental objectives of Part 2. Such a ruling would call into question other similar Public
14 Trust and Public Interest testimony that has already been submitted into evidence.

15
16 As described in detail below, only very minor portions of the Del Piero Testimony are
17 outside the scope of Part 2 and can therefore be stricken.

18 **II. ARGUMENT.**

19 **A. Mr. Del Piero’s Testimony Concerning the Question of Water Availability -- like**
20 **other Witnesses’ Testimony on the Subject – is Integral to the Public Trust and**
21 **Public Interest Arguments in Part 2.**

22 Marc Del Piero’s Part 2 Testimony focuses on the Public Trust and Public Interest
23 obligations of the Water Board in evaluating and rendering a decision on the Change Petition.
24 Speaking from profound experience in California water matters, including his years as a
25 Hearing Officer on the Water Board itself, he explained: **“I’ve indicated in my testimony that**
26 **in water rights – that a water availability analysis is necessary for you to satisfy your**
27 **public trust duties.”** (April 25, 2018 Transcript, 28:24-29:2.)¹

28
¹ Unless otherwise stated, all references to the “Transcript” herein are to the “Rough Draft”

1 Drawing upon Legislatively expressed State policy, his intimate experience with, and
2 understanding of, the duties of the State Board, and pertinent statutory and decisional law, Mr.
3 Del Piero explained that the Board must consider the proposed project's potential injury to
4 Public Trust resources, just as it considered the project's potential injury to legal users of water
5 in Part 1 and as it must consider the potential injury to the Public Interest. He explained,
6 further, that in considering the potential adverse consequences of the proposed project to the
7 Public Trust, the Water Board must determine, as a threshold matter, whether there is
8 sufficient water in the system to approve the proposed project without further injury to the
9 Public Trust. As have other witnesses in this proceeding, he explained that the system is
10 already over-appropriated and that the failure to even consider how much water is available
11 amounts to an admission that there is not enough water in the system to support this project
12 without injury to Public Trust resources:

13 Failure to cause the preparation of a WAA [Water Availability Analysis] in light of
14 the unrefuted evidence of massive species loss and decline due to the lack of
15 water availability constitutes an admission that the State has erroneously
16 overcommitted on paper at least the available water resources of the Delta.

17 (April 25, 2018 Transcript, 20:12-17.)

18 In this respect, Mr. Del Piero's Part 2 testimony addresses an important Public Trust
19 issue that other witnesses have also addressed. (See, e.g., Exh. RTD-13 Revised, (Timothy
20 Stroshane PowerPoint), Slide 11 [discussing need for water availability analysis] and March
21 29, 2018 cross-examination, beginning at about 5:40-minute mark [discussing over
22 appropriation of water and seniority of water rights in relation to Exh. RTD-131 (October 26,
23 2012 "Testimony on Water Availability Analysis for Trinity, Sacramento, and the San Joaquin
24 River Basins Tributary to the Bay-Delta Estuary"]; Exh. RTD-12 (Timothy Stroshane Part 2
25 Testimony), pp. 39, 62-63, 66-68 [discussing new water right requested by petitioners and
26 need for water availability analysis].)

27 _____
28 WaterFix Hearing Transcript of April 25, 2018, which is the transcript cited in the DWR
Objections.

1 Again drawing upon his multifold experience with California water policy and law, and
2 the decision-making duties of the Water Board itself, Mr. Del Piero traced the overarching
3 importance of the Public Trust through the *National Audubon* and *Racanelli* decisions and the
4 2009 Delta Reform Act and then addressed the importance of determining whether sufficient
5 water exists in the system to approve the proposed project without injury to the Public Trust.
6 (See pp. 11-15, *infra*, examining the *National Audubon* and *Racanelli* decisions underlying
7 much of Mr. Del Piero’s testimony.) Asked on cross-examination to explain why a water
8 availability analysis is essential, he answered:

9 A water availability analysis is required because the State Legislature has
10 embodied that requirement in the statutes.

11 A water availability analysis is required because the Audubon court and
12 Judge Racanelli told us we needed to do it.

13 A water availability analysis is required because of the Board’s ongoing
14 obligations to continue to monitor and adjust and – protections for the public trust
15 resources in the Delta and absent a water availability analysis the Board can’t
16 exercise its constitutional as well as its statutory duties.

17 (April 25, 2018 Transcript, 34:16-35:2.)

18 Asked whether he thinks there is any way to achieve a balancing of the Public Trust in
19 the context of considering the Change Petition “without first conducting an actual water
20 availability analysis,” Mr. Del Piero responded definitively: “No.” (April 25, 2018 Transcript,
21 41:12-16.)

22 In short, Mr. Del Piero’s testimony about the importance of a water availability
23 determination as an essential step in balancing the Public Trust goes to the very heart of Part
24 2. Yet, DWR insists that water availability is a Part 1 issue because it also goes to the
25 question of whether the Petition actually requests a new water right. (DWR Objection, p. 3.)

26 As the quotations from Mr. Del Piero’s testimony above demonstrate, DWR is plainly
27 wrong. Mr. Del Piero’s Part 2 testimony predominantly concerns the Board’s duty to determine
28 whether sufficient water is available in the system addressed the Public Trust, **not** the Part 1

1 question concerning the nature of the Petition. He explained, further, that rather than
2 determining water availability – i.e., whether enough “wet” water (as distinguished from “paper
3 water”) is available to support the project without injury to Public Trust resources, DWR has
4 attempted to avoid the issue altogether and to persuade the Water Board to ignore “over seven
5 decades of hydrologic records related to rainfall, runoff, increasing in-Delta and out-of-Delta
6 consumptive uses, water quality change, flow data, and their own modelling that Petitioners
7 are obligated to use to quantify how much actual ‘wet’ water actually exists for their proposed
8 purposes.” (CSPA 208-Corrected, 27:21-24.)

9 That said, Mr. Del Piero introduces his Part 2 water availability testimony with a few
10 sentences recapping of his Part 1 observation that the Petition does indeed constitute a
11 request for a new water right, which, as a matter of law, requires a water availability analysis.
12 (CSPA 208-Corrected, 27:14-18.) Considered in isolation – not in the context of Mr. Del
13 Piero’s overall Part 2 Testimony on this subject – those lines appear to address Part 1, not
14 Part 2, issues. **Accordingly, if the Hearing Officers wish to evaluate these statements
15 within the Del Piero Testimony out of context and rule upon them on that basis, then
16 San Joaquin County et al. agree that those three sentences should be stricken. (See
17 CSPA 208-Corrected, 27:14-18 [beginning with “As the Petition requests” and ending
18 with “(Wat. Code, § 1375, subd. (d).)”.].)**

19
20 DWR also objects to Mr. Del Piero’s Part 2 testimony about the need to determine
21 whether sufficient water is available in the system to both meet Public Trust requirements and
22 approve the proposed project on the ground that this Board, acting on its own, struck the
23 “water availability” discussion from his Part 1 Testimony. (DWR Objection, pp. 2-3, citing the
24 Board’s April 13, 2017 Ruling at p. 2.)

25
26 That *sua sponte* ruling concerned Part 1 issues. Specifically, the ruling noted that one
27 key issue for Part 1 is whether the Petition would “**initiate a new water right**” but that issue
28 “**does not extend to what would be required to support an application for a new water**

1 **right permit is a new water right permit were required for the California WaterFix**

2 **Project.”** The ruling did not touch at all upon the Public Trust issues in Part 2, which, as Mr.
3 Del Piero and others have testified, necessarily require a determination as to whether there is
4 sufficient “wet water” in the system to approve the project without injury to Public Trust
5 resources. On its face, the ruling applied only in Part 1, and that is how San Joaquin County et
6 al. understood it at the time. Had the ruling expressly extended to Part 2, i.e., purported to
7 exclude discussion of water availability from a balancing of the Public Trust, or even mentioned
8 the “Public Trust” or “public interest,” San Joaquin County et al. (and presumably other
9 protestants) would have requested briefing on the subject.
10

11 But, although such an interpretation would render the April 13, 2017 ruling facially
12 absurd, that is precisely the interpretation DWR now urges.² Such an expansive reading of
13 that narrow Part 1 ruling should be rejected out of hand, as it would undermine any rational
14 Public Trust discussion in Part 2.
15

16 **B. Most of Mr. Del Piero’s References to CEQA and Environmental Review Do Not**
17 **Challenge Compliance with CEQA; They Are Relevant and Within the Scope of**
18 **Part 2 of this Proceeding.**

19 The Hearing Officers have determined that Petitioners’ compliance with the California
20 Environmental Quality Act (“CEQA”) is not an issue in this proceeding. The Hearing Officers
21 have so ruled, and all parties herein, including San Joaquin County et al., understand that.
22 With only three (3) very insubstantial exceptions, the testimony of Mr. Del Piero to which DWR
23 objects on this ground does not concern compliance with CEQA. Rather, as explained below,
24
25

26 ² It must be remembered that the April 13, 2017 ruling with respect to the water availability
27 discussion in Mr. Del Piero’s Part 1 written testimony was *sua sponte*; it was not based upon
28 any party’s objection to that aspect of the written testimony, nor was it the subject of any
briefing. Had the ruling addressed Part 2 Public Trust issues or stated that whether sufficient
water exists in the system to both approve the project and protect the Public Trust from injury
is somehow outside the scope of Part 2, then San Joaquin County et al. and other protestants,
including all of the environmental groups, would have briefed and argued the issue.

1 his testimony distinguishes the Board's obligations under CEQA from its independent duties
2 under the Water Code. This was further illuminated in cross examination by Mr. Ruiz, during
3 which Mr. Del Piero referred to the CEQA and Water Code requirements as "apples and
4 oranges." (See April 25 Transcript, pp. 55-66.)

5 The specific portions of Mr. Del Piero's written testimony to which DWR objects on this
6 ground are listed below, along with responsive information explaining why the testimony
7 should not be stricken.
8

9 Exhibit CSPA-208-Corrected, p. 5:18-21: This passage addresses the failure of DWR
10 to address the co-equal goals as mandated in the Delta Reform Act. It uses the EIR/EIS as an
11 example in support of this substantive argument. This passage should not be stricken .

12 Exhibit CSPA-208-Corrected, p. 8:21-23: This passage is not a critique of the CEQA
13 document for the Delta Tunnels. It is a critique of DWR's application of a CEQA standard to
14 an evaluation of Public Trust resources; Mr. Del Piero observed that this standard is an
15 incorrect standard. This passage should not be stricken.

16 Exhibit CSPA-208-Corrected, p. 11:16-24: This passage goes, first, to the sequencing
17 of environmental review and hearing, and contrasts how the Board in the Mono Lake hearing
18 sequenced environmental review in contrast to how the Board has allowed sequencing of
19 environmental review in this Hearing. This statement pertains to the Board's decision-making
20 process and is completely appropriate. It is, moreover, a subject matter on which the author
21 clearly has expertise.

22 The passage goes, second, to the procedural dilemma that the Board faces because
23 DWR's environmental review does not encompass a range of flow alternatives that encompass
24 the Delta flow criteria that the witness believes are appropriate. The Hearing Officers in fact
25 already anticipated that the Board may issue flow requirements for the Delta Tunnels that are
26 more stringent than D-1641. (See, e.g., February 11, 2016 Ruling, pp. 4-5; March 4, 2016
27 Ruling, pp. 4-5; April 25, 2016 Ruling, pp. 2-3.)
28

1 Exhibit CSPA-208-Corrected, p. 13:5-25: This passage goes to the need of the Board to
2 determine the source of water that would be used to serve the permits if the change in point of
3 diversion is granted. Mr. Del Piero states that the Board must find that water to serve the
4 permits will not harm the Public Trust. The witness uses the example of Mono Lake to show
5 that in a prior case, the Board conducted its own CEQA review in order to complete such an
6 analysis. The point in the present passage goes not to the adequacy of the environmental
7 review for the Delta Tunnels *per se* but, rather, to DWR's argument that existing permits are a
8 sufficient basis for finding that Public Trust resources will be protected if those permits are
9 modified.

10 There are, however, three phrases identified in DWR's Objection that could be stricken
11 because they refer directly to the adequacy of the CEQA documents for the Delta Tunnels.
12 These are:

13 Exhibit CSPA-208-Corrected, p. 9:3 San Joaquin County et al. agree that "the CEQA-
14 required environmental information" may be stricken.

15 Exhibit CSPA-208-Corrected, p. 18:3: San Joaquin County et al. agree that "as
16 required by CEQA" may be stricken.

17 Exhibit CSPA-208-Corrected, p. 28:24-25: San Joaquin County et al. agree that
18 "without acknowledging any need for mitigations pursuant to CEQA" may be stricken.

19 **C. Mr. Del Piero's Testimony Concerning "Paper Water" Goes to the Heart of Part 2's**
20 **Public Trust and Public Interest Issues and Is Central to Any Responsible**
21 **Analysis of Public Trust and Public Interest Issues, Notwithstanding DWR's**
22 **Recharacterization of it as a Part 1 Argument About Whether the Petition Seeks a**
23 **New Water Right.**

24 A key component of Mr. Del Piero's Testimony about the Board's obligation to balance
25 the Public Trust in its decision-making concerning the Change Petition is the necessity of
26 determining that there is sufficient actual or "wet" water (as distinguished from "paper water") in
27 the system to meet Public Trust requirements before permitting DWR to export additional
28 water under its existing water right. Uncomfortable with this common-sense approach to the
Board's Public Trust duties, DWR recharacterizes Mr. Del Piero's written testimony on this

1 point as an argument that the Petition is actually a petition for a new water right. (DWR
2 Objection, p. 4.) On this ground, DWR seeks to strike page 21:15-24:11 of the Del Piero
3 Testimony and p. 24:5-10 and p. 35:3-37:3 of the April 25, 2018 Transcript.

4 This transmutation of Mr. Del Piero's testimony is simply incorrect, as explained at pp.
5 3-7, *supra*, and pp. 11-15, *infra*. For the same reasons that DWR's attack on the Del Piero
6 Testimony about water availability misses the mark, this argument, too, fails. Mr. Del Piero's
7 written testimony at pp. 21:15 -24:11 properly addresses the same core Part 2 issue: the
8 necessity of determining whether sufficient water exists in the system to allow approval of the
9 petition without injury to the Public Trust or the Public Interest. It is in this context that Mr. Del
10 Piero invokes the constitutional implications of *National Audubon* and Petitioners' troubling
11 historical reliance on "paper water" as distinguished from the actual "wet water" required to
12 meet Public Trust and Public Interest obligations.

13
14
15 As Mr. Del Piero aptly stated in his oral testimony:

16 [E]veryone needs to just face up to the reality that – that – that the public trust
17 resources and the ecological health of the Delta is in effective free-fall. . . . In
18 the Delta, without recognizing that there's a problem. And the problem is real
19 simple. . . . You can throw as much money at the Delta as you want. Until
20 there is water available for the protection of public trust resources, until more
21 water is committed by the State Board and the State to the protection and
22 preservation of public trust resources, then continuing to rely on old paper and
23 new pipes isn't going to fix the problem.

24 (April 25, 2018 Transcript, p. 36:10-13 and p. 36:21-37:3.) This testimony, which DWR would
25 dearly love to have stricken, is squarely within the scope of Part 2.

26
27
28 **D. Mr. Del Piero's Testimony About the Water Board's Overarching Duty to Protect
Public Trust Resources in Rendering Water Rights Decisions, Including
Decisions on Change Petitions, Is Fully Within the Scope of Part 2.**

In its unrelenting effort to dismiss the Public Trust as merely a catch-phrase rather than
an overarching duty of the Water Board, DWR also attacks Mr. Del Piero's testimony
concerning the Board's obligation to avoid injury to Public Trust resources. (See DWR

1 Objection, p. 5, attacking pp. 24:12-25:6 of Mr. Del Piero's written testimony and related oral
2 testimony.)

3 Again, DWR misses the mark. At pages 24-25 of his written testimony, Mr. Del Piero
4 observes that DWR has confused CEQA mitigation measures – ***which are not the issue in***
5 ***this proceeding*** – with the Board's overarching obligation to balance the Public Trust in
6 making any water right decision, including decisions on change petitions under Water Code
7 §1701 et seq. – ***which is an issue in Part 2 of this proceeding***. He invokes State water
8 policy on this point, and statutory and decisional law reaffirming that policy, throughout his
9 testimony. In particular, he cites the *National Audubon* and *Racanelli* decisions, as well as the
10 2009 Delta Reform Act, to support his opinion that the project cannot be lawfully approved in
11 the absence of a determination that it would not result in further injury to Public Trust
12 resources.
13

14 In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the California
15 Supreme Court clarified the applicability of the Public Trust doctrine to California water rights.
16 “The interests protected by the public trust are non-consumptive, instream uses: navigation,
17 fishing, recreation, ecology and aesthetics.” (33 Cal.3d at pp. 149-150.) The State, as trustee,
18 retains supervisory control over the State's waters and has both the duty and the power to
19 reconsider its past water rights decisions in light of current knowledge. **No party has a**
20 **vested right to appropriate water in a manner harmful to the interests protected by the**
21 **public trust.**” (33 Cal.3d at p. 445, emphasis added.)
22
23

24 The Public Trust imposes an ever-present affirmative duty on State agencies, as
25 explained in *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82,
26 commonly referred to as the “*Racanelli* Decision”:

27 More recently, in [*National Audubon*], the California Supreme Court underscored
28 a further significant limitation on water rights: the “public trust” doctrine. The
court there held that the state's navigable waters are subject to a public trust and

1 that **the state, as trustee, has a duty to preserve this trust property from**
2 **harmful diversions by water rights holders.**

3 (*Racanelli, supra*, 182 Cal.App.3d at p. 106, emphasis added; see, also, p. 150 [explaining that
4 the SWRCB's authority under the Public Trust doctrine "exists as a matter of law itself," without
5 the need for any recital of authority (emphasis in original)].)

6 **Racanelli explains that the State, acting through the Board, "has an affirmative**
7 **duty to take the public trust into account in the planning and allocation of water**
8 **resources, and to protect public trust uses whenever feasible.**" (182 Cal.App.3d at p.

9 151, quoting *National Audubon* at 33 Cal.3d at pp. 446-447.) In short, in this proceeding the
10 Water Board has an affirmative duty to assure that approval of the proposed project would not
11 result in further injury to Public Trust resources in the Delta. Mr. Del Piero's testimony on this
12 point is squarely within the scope of Part 2 and firmly grounded in California law and public
13 policy.
14

15 The 2009 Delta Reform Act recognized and further strengthened the *Audubon/Racanelli*
16 decisions with respect to Public Trust protection of the Delta in particular:
17

18 **The longstanding constitutional principle of reasonable use and the public**
19 **trust doctrine shall be the foundation of state water management policy**
20 **and are particularly important and applicable to the Delta.**

21 (Wat. Code, § 85023.)

22 This clarion declaration of the importance of the Public Trust in all Delta water decisions
23 comports with the Legislature's express recognition that: (a) "the Delta is a distinct and
24 valuable natural resource of vital and enduring interest to all the people and exists as a
25 delicately balanced estuary and wetland ecosystem of hemispheric importance" (Wat. Code, §
26 85022, subd. (c)(1)) and (b) protection of the Delta is of "paramount concern to present and
27 future residents of the state and nation" (Wat. Code, § 85022, subd. (c)(2)). Also consistent
28 with State policy governing Delta water matters, the Legislature declared the necessity of

1 reducing reliance on the Delta for consumptive uses. (Wat. Code, § 85021.) The Legislature
2 also directed the Water Board and Department of Fish and Wildlife to develop objectives and
3 flows protective of the Delta's Public Trust resources, and those flow criteria must be used in
4 any hearing to change the point of diversion for the State Water Project. The Legislature also
5 stated its intent that state agencies "determine instream flow needs of the Delta" for making
6 planning decisions and achieving Delta Plan objectives. (Wat. Code, § 85086, subd. (b).) It
7 also required the Water Board to develop flow criteria that would protect Delta Public Trust
8 resources. (Wat. Code, § 85086, subd. (c)(1).) The Legislature further required that the Water
9 Board consider these latter flow criteria in development "appropriate Delta flow criteria" for the
10 Petition facilities and Petitioners' water rights permits if and when the time came:

12 [A] change in the point of diversion of the State Water Project or the federal
13 Central Valley Project from the southern Delta to a point on the Sacramento
14 River shall include appropriate Delta flow criteria and shall be informed by the
analysis conducted pursuant to this section.

15 (Wat. Code, § 85086, subd. (c)(2).)

16 Furthermore, Mr. Del Piero's testimony about water availability and avoidance of injury
17 to non-consumptive instream uses is directly relevant to Part 2's Public Interest component. In
18 reviewing **any permit application**, the Board must determine whether the permit would be in
19 the "Public Interest." *Racanelli* explains:

21 The nature of the public interest to be served by the Board is reflected throughout
22 the statutory scheme. As a matter of state policy, water resources are to be used
23 "to the fullest extent . . . capable" (§ 100) with development undertaken "for the
24 greatest public benefit" (§ 105). And in determining whether to grant or deny a
25 permit application in the public interest, the Board is directed to consider "any
26 general or co-ordinated plan . . . toward the control, protection, development . . .
and conservation of [state] water resources . . ." (§ 1256), as well as the "relative
benefits" of competing beneficial uses (§ 1257). Finally, the Board's actions are to
be guided by the legislative policy that the favored or "highest" use is domestic,
and irrigation the next highest. (§ 1254.)

27 **Nonconsumptive or "instream uses," too, are expressly included within the**
28 **category of beneficial uses to be protected in the public interest. Thus, the**
Board must likewise consider the amounts of water required "for recreation
and preservation and enhancement of fish and wildlife resources" (§ 1243)

1 and needed "to remain in the source for protection of beneficial uses,
2 including any uses . . . protected in any relevant water quality control plan .
3 . ." (§ 1243.5).

(*Racanelli, supra*, 182 Cal.App.3d at p. 103, emphasis added.)

4 Significantly, *Racanelli* arose not in the context of a request for issuance of a new
5 request for a permit to appropriate water but, rather, in the context of judicial consideration of
6 "the scope of the Board's dual responsibility to regulate water quality and to supervise
7 appropriation permits." (*Id.* at p. 111.) The Change Petition at issue in this Hearing is plainly
8 subject to this Board's "**responsibility to . . . supervise appropriation permits.**"

9
10 The *Racanelli* court also recognized that the "Public Interest" duties of the Board require
11 it to consider whether sufficient unappropriated water exists in ruling on any requested water
12 right permit:

13 In performing its dual role,³ including development of water quality objectives, **the**
14 **Board is directed to consider not only the availability of unappropriated**
15 **water** (§ 174) but also *all* competing demands for water in determining what is a
16 reasonable level of water quality protection (§ 13000). In addition, the Board
17 must consider "past, present, and probable future beneficial uses of water" (§
18 13241, subd. (a)) as well as "[water] quality conditions that could reasonably be
19 achieved through the coordinated control of *all* factors which affect water quality
20 in the area" (§ 13241, subd. (c), italics added).

(*Racanelli, supra*, 182 Cal.App.3d at p. 118, emphasis added.)

21 In sum, DWR's unhappiness with Mr. Del Piero's testimony to the effect that the Water
22 Board has an affirmative duty to assure that project approval would not result in injury to Public
23 Trust resources or the Public Interest does not remove his testimony from the scope of Part 2.
24 Mr. Del Piero's testimony on this issue is amply supported by California law and water policy,
25

26
27 ³ The *Racanelli* court described the Board's "dual role" as its "perform[ing] both adjudicatory and
28 regulatory functions in allocating water rights and ensuring water quality." (182 Cal.App.3d at p.
112.)

1 as explained throughout his written and oral testimony. It is in this context that Mr. Del Piero
2 speaks of the “no injury” rule with respect to Public Trust resources in the Delta.

3 **E. Del Piero’s Testimony on How the Delta Tunnels Would Harm the Public Trust Is**
4 **Within His Area of Expertise – His Testimony Does Not Purport to be that of a**
5 **Biologist or Hydrologist.**

6 As petitioners acknowledge, Mr. Del Piero has acknowledged expertise at how the
7 Board should evaluate the public interest and effects of a proposed project on Public Trust
8 resources. (Objection p. 6:5-7.) This expertise is not somehow devalued because Mr. Del
9 Piero is not also a scientific expert on those Public Trust resources themselves. Mr. Del Piero
10 reviewed information on the environmental documents prepared regarding the environmental
11 impacts of constructing and operating the Delta Tunnels and is qualified to opine on the
12 relationship between those impacts and the Public Trust and Public Trust issues discussed in
13 his testimony. Moreover, ample information is available in other Part 2 testimony, some of
14 which is by experts in the relevant biological and other fields, regarding the specific effects of
15 the proposed project on Public Trust and other resources.

16 Mr. Del Piero also has expertise in how the Board should use its own work, including
17 the 2010 Delta Flow Criteria Report.

18 These types of objections go to weight, not admissibility. (See, e.g., February 21, 2017
19 Ruling, p. 6.) As explained by the Hearing Officers: “An evidentiary objection should not be
20 used by a party to argue the merits of a case [A]rguments concerning the merits of a
21 witness’ testimony . . . are more properly addressed through cross-examination of the witness,
22 presentation of a party’s own case-in-chief, rebuttal, or legal briefs.” (*Ibid.*) Having voluntarily
23 waived its right to cross-examination, DWR should not be allowed to strike out Mr. Del Piero’s
24 testimony because DWR does not like it.

25 **F. DWR’s Objection that Mr. Del Piero’s Testimony is “a Legal Brief Masquerading**
26 **as Testimony” is Ironically Misplaced; To the Extent Some Statements in His**
27 **Testimony, Like Those of Some of Petitioners’ Witnesses, Constitute Legal**
28 **Opinion, DWR’s Objection Goes to Weight, Not Admissibility.**

Mr. Del Piero’s testimony is about California water policy, as expressed in California
statutory and decisional law, as well as in the Water Board’s processes and decision-making,

1 i.e., how the Board should analyze and weigh evidence in this proceeding. His testimony
2 transcends mere legal opinion, based as it is in his vast experience as a Hearing Officer with
3 the Water Board, his many years of experience with water decisions while serving on the
4 Monterey County Board of Supervisors and on the Monterey Planning Commission, and, yes,
5 his extensive experience as a water law attorney and Professor of Law teaching California
6 water law. (See Exh. CSPA-209, Mr. Del Piero's Statement of Qualifications.) Fundamentally,
7 his written and oral testimony are about how the Water Board goes about doing business
8 consistent with the requirements of the Public Trust and the Public Interest.

9 The irony in DWR's characterization of Mr. Del Piero's testimony as legal opinion
10 "masquerading as testimony" can be succinctly demonstrated by examination of the Part 1
11 testimony of DWR's "water rights" witness, Maureen Sergent. For example, Sergent testified
12 about the distinction between a "water right change" and "a new water right application" as
13 follows:

14
15 The State Water Board analyzed the question of what distinguishes a water right
16 change and a new water right application in order WR 2009-0061 (available at
17 [http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/ords/2009/wr2009_0061.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wr2009_0061.pdf)). It is my understanding that in Order 2009-0061, the
18 State Water Board stated that it is well established that an appropriator may
19 change elements of a water right, including the point of diversion, as long as the
20 change will not injure other legal users of water. The State Water Board clarified
21 that: A fundamental principle of water right law, however, is that a right cannot
22 be so changed that it in essence constitutes a new right. (Cal. Code Regs., tit.
23 23, § 791, subd. (a).) For example, an appropriator cannot expand an existing
24 right to appropriate a greater amount of water, to increase the season of
25 diversion, or to use a different source of water. (Cal. Code Regs., tit. 23, § 699;
26 Johnson Rancho County Water District v. State Water Rights Board (1965) 235
27 Cal.App.2d 863, 879.) (WR 2009-0061, p. 5-6)

28 (Exh. DWR-53, p. 9:16-28.)

Ms. Sergent added:

It is my understanding that Water Code Section 1701 does not limit an allowable
change to a single new point of diversion, nor does it place a cap on the quantity
of water that may be diverted at a new proposed point of diversion if it is within
the quantities currently authorized in the existing water rights permits. The State
Water Board can condition approval of the Petition for Change to maintain the

1 prior water rights permits limits on diversion. Thus, the above State Water Board
2 decisions and orders, and the limited change requested in the CWF Petition for
3 Change support a determination by the State Water Board that the CWF Petition
4 will not, in effect, initiate a new water right.

5 (DWR-53, p. 10:16-23.) In her written Part 1 Rebuttal Testimony, Ms. Sergent articulated her
6 opinion on another key legal issue in this proceeding: whether the water right permits
7 underlying Petitioners' Change Petition have expired. (Exh. DWR-77, pp. 6-8.)

8 These portions of Ms. Sergent's testimony go to some of the most contentious, devious
9 and complex legal issues in this proceeding – whether Petitioners' Change Petition constitutes
10 a request for a new water right. Neither the fact that Ms. Sergent is not a lawyer nor her liberal
11 use of the introductory phrase – “it is my understanding” – can change the nature of her
12 testimony. It is legal opinion, plain and simple.

13 Nor – given the subject matter of this proceeding – is that surprising. The guiding
14 policies, rules, restrictions and priorities governing Delta water issues are so intimately
15 interwoven with statutory and decisional law addressing Delta water issues that it would not be
16 possible to discuss the former without discussing, or at least referring to, the latter. (See, e.g.,
17 Exh. PCFFA-87 (Tom Stokely Testimony), p. 4 [citing to recent Ninth Circuit authority], pp. 6-7
18 [discussing State laws and policies]; Exh. CSPA-200 Corrected (William Jennings Part 2
19 Testimony), pp. 8-10 [extensive discussion of the *Racanelli* decision, its background, holding,
20 and aftermath]; Exh. SDWA-51-FR (Nomellini Part 1 Testimony), pp. 17-22 [discussing legal
21 authorities pertaining to area of origin protections]; Exh. SDWA-300 Corrected, (Nomellini Part
22 2 Testimony), pp. 22-24 [discussing legal authorities pertaining to salinity control].) In any
23 event, the fact that testimony may contain legal conclusions goes to weight, not admissibility.
24 (February 21, 2017 Ruling, p. 13.) That is as true of Ms. Sergent's Testimony (DWR-53 and
25 DWR-77) as it is of Mr. Del Piero's Testimony (CSPA-208-Corrected).

26 **III. CONCLUSION.**

27 For the foregoing reasons, DWR's Objections should be overruled and its Motion to
28 Strike denied, with the following exceptions.

1 As explained above, San Joaquin County et al. recognize that the following language in
2 Mr. Del Piero's written testimony (CSPA-208-Corrected) goes to CEQA issues beyond the
3 scope of Part 2: page 9, line 3 -- "*the CEQA-required environmental information to establish*";
4 page 18, line 13 -- "*as required by CEQA*"; and page 28, lines 21-25 -- "*without acknowledging*
5 *any need for mitigations pursuant to CEQA.*" That language, therefore, could be properly
6 stricken from CSPA-208-Corrected.

7 We also agree that considered in isolation – not in the context of Mr. Del Piero's overall
8 Part 2 Testimony on this subject – page 27, lines 14-18 [beginning with "*As the Petition*
9 *requests*" and ending with "*(Wat. Code, § 1375, subd. (d).)*"] appear to address Part 1 issues.
10 Therefore, if the Hearing Officers determine there is some risk that these phrases of testimony
11 could be evaluated out of context, then San Joaquin County et al. agree that those three
12 sentences should be stricken from CSPA 208-Corrected.

13
14 Dated: April 30, 2018

FREEMAN FIRM,

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THOMAS H. KEELING

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18 Dated: April 30, 2018

SOLURI MESERVE,

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20 
OSHA R. MESERVE

21
22 Dated: April 30, 2018

MICHAEL B. JACKSON,

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24 
MICHAEL B. JACKSON